

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Applications of)	Appeal No. 95-0131
)	
HUGH R. WISNER,)	
Appellant)	
)	DECISION
and)	
)	
GEORGE R. SCHMITZ,)	
Respondent)	October 28, 1996
_____)	

STATEMENT OF THE CASE

On August 14, 1995, Appellant Hugh R. Wisner filed a timely appeal of an Initial Administrative Determination [IAD] issued by the Restricted Access Management Division [Division]. The IAD, dated, June 14, 1995, found that Respondent George R. Schmitz had demonstrated that he held a lease of the F/V DESPERADO from June 9, 1987, to September 30, 1987, and from June 6, 1988, to September 30, 1988; the F/V TOP GUN from April 15, 1989, to September 30, 1989; and the F/V ALYSSA-ANN from April 15, 1990, to December 31, 1990. The IAD allocated the qualifying pounds of halibut landed from the vessels during those periods to Mr. Schmitz. The IAD also denied the same qualifying pounds to the vessels' owner, Mr. Wisner.

An oral hearing was held June 6, 1996, at Homer, Alaska before Appeals Officer James C. Hornaday. Mr. Wisner testified in person; Mr. Schmitz by telephone. The parties were given until June 16, 1996, to supplement the record. Mr. Wisner has adequately shown that his interest is directly and adversely affected by the IAD.

ISSUES

1. Whether valid vessel leases were created.
2. Whether and when the vessel leases were put into effect.
3. Whether Mr. Wisner's due process rights were violated.

BACKGROUND

Mr. Wisner indicated on his Request for Application [RFA] and Application for QS that he did not lease the vessels to anyone. To the contrary, Mr. Schmitz claimed on his RFA that he leased the

vessels from Mr. Wisner during the conflict periods. In support of his claim, Mr. Schmitz submitted copies of "Bare Boat Charters" [Charters] for each of the vessels during each period signed by both parties.

The Charters provided, among other things, that Mr. Schmitz would:

- P pay Mr. Wisner 45% of the gross fishing proceeds as rent;
- P serve as master of the vessel;
- P reimburse Mr. Wisner for the cost of insurance;
- P keep the vessel seaworthy;
- P control, possess, command the vessel;
- P indemnify Mr. Wisner against claims, actions, proceedings, damages, and liabilities;
- P furnish the crew; and
- P pay all of the vessel's operating expenses.

Mr. Wisner claims that he and Mr. Schmitz never operated under the terms of the Charters, and that Mr. Schmitz was, in fact, an employee, not a lessee. As proof, he submitted an affidavit in which he affirmed that he had other bareboat charter agreements that were never executed; copies of IRS forms (1099) showing payments by Mr. Wisner to Mr. Schmitz of fishing boat proceeds; and 1992 bankruptcy schedules showing that when Mr. Schmitz declared bankruptcy in 1992, he did not declare his QS as an asset. The parties disagree as to who had control of the vessels and who paid for the expenses of the operation of the vessels during the period of the Charters. During the hearing, the parties acknowledged that the F/V ALYSSA-ANN was returned to Mr. Wisner during the period of September through December 1990. The Division's records show that no landings of halibut or sablefish were made from the vessel during that period of time.

DISCUSSION

1. Whether valid vessel leases were created.

Under the IFQ program, as implemented by the Division, an applicant for QS may receive credit only for legal landings of Pacific halibut or sablefish that were made from a vessel owned or leased at the time of the landings. 50 C.F.R. § 679.40(a)(2).¹ A written vessel lease can be conclusive evidence of the existence of a vessel lease between the parties. 50 C.F.R. § 679.40(a)(3)(iii).² To be conclusive evidence, a written lease must identify the leased vessel, the

¹Formerly 50 C.F.R. 676.20(a)(1). All IFQ regulations were renumbered, effective July 1, 1996. *See*, 61 Fed. Reg. 31,270 (1996). The wording of the regulation in question was unchanged by the renumbering.

²Formerly 50 C.F.R. 676.20(a)(1)(iii).

name of the lease holder, and the period of time during which the lease was in effect. *Id.* Where, as in this case, an applicant has submitted a written document said to be a vessel lease, the appropriate inquiry on appeal is whether the document on its face actually constitutes a vessel lease for purposes of the IFQ program.

The inquiry into whether a document constitutes a valid vessel lease begins with an examination of the provisions in the document itself, rather than with other evidence concerning the intent or actual conduct of the parties. In the absence of evidence challenging the validity of the agreement, a document that contains provisions consistent with a vessel lease is conclusive evidence of the existence of a vessel lease between the parties, and the inquiry on that question need go no further. However, evidence that the agreement was invalid (void) *ab initio*, such as evidence of fraud, duress, coercion, or incapacity, is always relevant should be considered.³

Mr. Wisner does not argue that the documents in question are invalid, nor is there any such evidence in the record. Therefore, we look to the provisions of the documents themselves to determine whether they constitute valid vessel leases.

The title and the terminology used in a document are relevant evidence of whether the parties intended the document to constitute a vessel lease. The documents in this appeal are entitled "BARE BOAT CHARTERS," the parties are referred to as "owner" and "charterer," and the words "rent" or "charter hire" are used. Such language, while not in itself determinative, is consistent with a vessel lease and indicates the intent of the parties to create a vessel lease. Use of the word "lease" or "charter" is highly persuasive, even when not conclusive.⁴

The Charters provide that Mr. Schmitz, as charterer, was responsible for the operating expenses of the vessels, had the exclusive possession, control, and command of the vessels, was required to pay Mr. Wisner 45% of the vessels' gross proceeds, and was given possession of the vessels for a guaranteed or set time period. Mr. Schmitz was also required to indemnify Mr. Wisner for any uninsured loss, to maintain insurance, and to be the sole master of the vessels. Mr. Schmitz's use of the vessels was not restricted, as long as they were used for commercial fishing. Mr. Schmitz was not, however, permitted to assign his responsibility as the master of the vessels.

Looking at the documents as a whole, all of the provisions are consistent with vessel leases. Consequently, I find that the documents constitute valid vessel leases. Because the documents identify

³If the Appeals Officer finds that a written document does not constitute a valid agreement between the parties, the document may still be considered as relevant evidence of the relationship between the parties, along with other evidence of the parties' actual conduct and intent.

⁴*See* Kristovich v. Dell, Appeal No. 95-0010, March 20, 1996, *aff'd* March 27, 1996.

the leased vessels, the name of the lease holder, and the period of time during which the agreements were to be in effect, as required by the regulations, I conclude that the documents constitute conclusive evidence of the existence of vessel leases between the parties.

2. Whether and when the vessel leases were put into effect.

Having determined that there were valid vessel leases between the parties, the next question is when were they in effect. This office has ruled that a valid written vessel lease is presumed to have been in effect for the term stated in the document, unless contrary evidence persuades otherwise.⁵ Evidence of subsequent conduct can be introduced to show that a valid vessel lease was terminated before the end of its stated term. In this case, all of the Charters specified a stated time period for the lease of the vessels.

Mr. Wisner argues that, in fact, the agreements were never put into effect. He asserts that the evidence of the actual conduct of the parties shows that, for the entire period in which the leases were said to have been in effect, a non-lease relationship in fact existed between the parties for the use of the vessels. While the parties agree that neither party expressly terminated the Charters by writing or word of mouth, Mr. Wisner asserts that the parties' conduct speaks for itself, and that it is evidence that Mr. Schmitz silently acquiesced in Mr. Wisner's unstated desire to cancel the leases.

In considering Mr. Wisner's arguments, I cannot disregard the Charters, since they constitute conclusive evidence of the existence of vessel leases. Mr. Wisner cannot prevail merely by showing that the parties' conduct during the stated terms in the leases differed from the provisions in the documents. To rebut the presumption that the leases were in effect for the stated terms, Mr. Wisner must demonstrate by a preponderance of the evidence that the parties agreed to set aside their leases or terminate them prematurely. In the absence of a subsequent written rescission, or an oral rescission plus other consistent conduct, the Appellant must produce evidence of actual subsequent conduct by the parties that (1) clearly establishes that the nature of the parties' business relationship was fundamentally changed; and (2) strongly supports an inference that the parties mutually intended to so change their relationship.⁶

In this case, Mr. Wisner is attempting to show that the parties' conduct diverged from the provisions of the leases to such a degree that one can infer that they implicitly rescinded the leases and never operated under their terms.

⁵See Dittrick v. Weikal, Appeal No. 95-0109, February 27, 1996, *aff'd* March 4, 1996.

⁶See Wisner v. Schauff, Appeal No. 95-0128, October 25, 1996.

The parties agree that they abided by most of the provisions of the charters. In particular, Mr. Wisner and Mr. Schmitz agree that Mr. Schmitz was the master on each of the vessels; Mr. Wisner received 45% of the vessels' gross proceeds; the vessels were fished in the agreed areas; Mr. Wisner was not on the vessels during the periods of the Charters; the landings were made by, and credited to, Mr. Schmitz; and one bookkeeper was used to provide figures and checks. The parties agree that the F/V ALYSSA-ANN was returned to Mr. Wisner for the period of September through December 1990, but that otherwise, the vessels were in Mr. Schmitz's possession for the entire periods of time stated in the leases.

Mr. Wisner testified that he in fact controlled the vessels' navigation, directed the harvesting and marketing of the fish, and paid the crew and vessels' operating expenses; that he treated the operation of the vessels as his business for tax purposes; and that he had veto power over the hiring and firing of the crew. Mr. Schmitz testified that he, not Mr. Wisner, was the one in control, and the one who paid the expenses. Mr. Schmitz did not submit a copy of his federal tax return to prove that he had treated the operation as his business. Mr. Wisner's records show that crew payments and operating expenses were deducted from the vessels' gross proceeds prior to the distribution of percentages to the parties.

Mr. Wisner also testified that Mr. Schmitz did not list the QS that he had received for the landings from the vessels as an asset on his bankruptcy schedule. Mr. Wisner submitted statements from canneries and a boat builder as proof that he directed the vessels' fishing operations. He further testified that the bookkeeper for the vessels worked for him. Mr. Schmitz contended, however, that this was done for reasons of simplicity.

As to the matters in dispute, I find that Mr. Schmitz was in control of the vessels because he was on each vessel as master, and Mr. Wisner was not on the vessels. I discount the statements from the boat builder and the cannery employees concerning Mr. Wisner's control of the vessel because there is no evidence that they had first-hand knowledge of who directed the relevant fishing operations. I find that the cost of insurance, the vessel's trip expenses, and the crew's compensation were paid from the gross fishing proceeds.

Mr. Wisner claims that he entered into the charters solely to limit his liability as a boat owner, upon the advice of his attorney and his insurance agent. He also asserts that he needed to comply with unspecified federal requirements that crew contracts be in writing and kept on board the vessel. I give these arguments no weight because (1) Mr. Wisner's motivation for entering into the charters is irrelevant to the question of whether and when the lease was put into effect; and (2) I know of no federal requirement that crew contracts be in the form of a bareboat charter.

In only one other case has this office found that a valid vessel lease was terminated prematurely. That was in the case of Dittrick v. Weikal, in which the parties stipulated that the claimed lessee had returned the vessel to the owner before the end of the stated lease term. Landings made from the vessel during

the remainder of the stated lease term, when the claimed lessee no longer had possession of the vessel, were credited to the owner. In Dittrick, the parties were in agreement that their arrangement, however characterized, was terminated early. It was clear from the parties' conduct in that case that they intended to end their business relationship earlier than planned.

In contrast, Mr. Wisner and Mr. Schmitz disagree about the nature and significance of their conduct during the stated lease terms. Also, unlike the parties in Dittrick, they continued on with their business relationship, and Mr. Schmitz continued to possess and operate the vessels, for the entire periods contemplated in the lease document [except, as already noted, for the F/V ALYSSA-ANN]. The parties' conduct, on the whole, was not fundamentally different from that called for under the terms of the charters, and it does not support an inference that the parties mutually intended and agreed to set aside the written leases.

Accordingly, I find by a preponderance of the evidence that Mr. Wisner has not overcome the presumption that the parties operated under the charters during the periods of time in question. The only exception to this finding is that the charter for F/V ALYSSA-ANN was terminated early because Mr. Schmitz returned the vessel in September 1990, approximately four months earlier than the end of the stated term.

3. Whether Mr. Wisner's due process rights were violated.

Mr. Wisner claims that IFQ regulation 50 C.F.R. § 679.43(a)(3)(iii)⁷ is arbitrary, unreasonable, and ultra vires, i.e., beyond the scope of power granted to the U.S. Department of Commerce and authorized by the U.S. Congress. This challenge to the legality of the IFQ regulations is not within the purview of this Office. An Appeals Officer must presume the legal validity of the agency's own duly promulgated regulations.⁸ The IFQ regulations in question were duly promulgated through notice and comment rulemaking pursuant to the requirements of the Administrative Procedure Act, 5 U.S.C. § 553 (1988).⁹ The AO has no authority to invalidate IFQ regulations and to order the relief sought on the grounds that the regulations are unconstitutional. Such broad review authority lies with the courts, and Mr. Wisner's redress on this legal argument must be sought in that forum. I note, however, that the IFQ regulations have been recently upheld as a permissible exercise of authority by the Secretary of

⁷See note 2.

⁸Charles J. Petticrew, Appeal No. 95-0008, July 3, 1996; George M. Ramos, Appeal No. 94-0008, Regional Director's Decision on Review, at 4, April 21, 1995.

⁹*Id.*, at 2. See, 58 Fed. Reg. 59,375 (1993).

Commerce.¹⁰

Mr. Wisner also claims that his substantive due process rights have been violated, and that the IAD was arbitrary, capricious, and an abuse of discretion. IFQ regulation 50 C.F.R.

§ 679.40(f)¹¹ provides that QS is not a property right subject to the "takings" provision under the Fifth Amendment of the U.S. Constitution. Consequently, Mr. Wisner's claim that his QS was an unlawful taking of property is without merit. Furthermore, I find that his claim that the IAD was arbitrary, capricious, and an abuse of discretion is moot because that shortcoming (even if true) has been substantially, if not completely, rectified by the granting of *de novo* review on appeal by this office.

FINDINGS OF FACT

1. Mr. Wisner and Mr. Schmitz entered into valid written agreements, entitled "BAREBOAT CHARTERS," for three vessels: the F/V DESPERADO, F/V TOP GUN, and the F/V ALYSSA-ANN.
2. The charters contain terminology and characteristics consistent with a vessel lease.
3. The charters identify the leased vessels; the name of the lease holder, Mr. Schmitz; and the period of time during which the leases were in effect: June 9, 1987, through September 30, 1987, and June 6, 1988, through September 30, 1988 [F/V DESPERADO]; April 15, 1989 through September 30, 1989 [F/V TOP GUN]; and April 15, 1990, through December 31, 1990 [F/V ALYSSA-ANN].
4. The charters were in effect for their stated terms, except for the charter of the F/V ALYSSA-ANN, which was not in effect for the period of September through December 1990, and during which period there were no qualifying halibut landings made from the vessel.
5. Mr. Wisner's claim that the IAD was arbitrary, capricious, and an abuse of discretion is moot.

CONCLUSIONS OF LAW

¹⁰See Alliance Against IFQs v. Brown, et al, Opinion No. 95-35077, dated May 22, 1996 (9th Cir. 1996).

¹¹Formerly 50 C.F.R. § 676.20(g) which reads: "Quota shares allocated or permits issued pursuant to this part do not represent either an absolute right to the resource or any interest that is subject to the "takings" provision of the Fifth Amendment of the U.S. Constitution. Rather, such quota shares or permits represent only a harvesting privilege that may be revoked or amended subject to the requirements of the Magnuson Fishery Conservation and Management Act and other applicable law."

1. The charters constitute vessel leases for purposes of QS under the IFQ program.
2. The charters are conclusive evidence of the existence of vessel leases between Mr. Wisner and Mr. Schmitz.
3. Mr. Wisner's claim that his QS was an unlawful taking of property is without merit.
4. Mr. Schmitz qualifies for halibut QS for the periods of time stated in the BAREBOAT CHARTERS, excluding September through December 1990.

DISPOSITION

The IAD that was the subject of this appeal is MODIFIED as to the dates during which the 1990 lease of the F/V ALYSSA-ANN was in effect, as specified in this DECISION. In all other respects, the IAD is AFFIRMED. This decision takes effect on November 27, 1996, unless by that date the Regional Administrator orders review of the decision. Any party, including the Division, may submit a Motion for Reconsideration, but it must be received at this office not later than 10 days after the date of this decision, November 7, 1996.

James C. Hornaday
Appeals Officer

I concur in the factual findings of this decision and I have reviewed this decision to ensure compliance with applicable laws, regulations, and agency policies, and consistency with other appeals decisions of this office.

Because the prevailing party in this appeal still has an opportunity to receive QS and the corresponding IFQ for the 1996 fishing season, I recommend that the Regional Director expedite review of this decision and, if there is no substantial disagreement with it, promptly affirm the decision and thereby give it an immediate effective date.

Randall J. Moen
Appeals Officer